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SUPREME COURT, U.S.
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No. 08-1562

IN THE
Supreme Court of the United States

SEA HAWK SEAFOODS, INC.,

Petitioner,

v.

EXXON MOBIL CORPORATION AND
EXXON SHIPPING COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The sole question properly presented is:

Where both the district court and the Ninth Circuit correctly stated this Court's "flexible" standard for judicial estoppel, *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001), whether the lower courts abused their discretion in applying that standard to the facts of this case?

RULE 29.6 STATEMENT

Respondent Exxon Mobil Corporation is a publicly held corporation, and no person or entity owns, directly or indirectly, 10% or more of its stock. Respondent Exxon Shipping Company is wholly owned, directly or indirectly, by Exxon Mobil Corporation.

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INTRODUCTION

In *New Hampshire v. Maine*, 532 U.S. 742 (2001), this Court held that three "flexible" and non-exhaustive factors should inform the decision of whether to apply judicial estoppel in a given case. *Id.* at 750-51. The district court's judgment is a straightforward, factbound application of the principles enunciated in *New Hampshire*. Neither that judgment, nor the Ninth Circuit's affirmance of it, conflicts with any decision of this Court or implicates any circuit conflict. This case is, in short, a most unworthy candidate for certiorari. The Petition should be denied.

STATEMENT OF THE CASE

The underlying issue here is whether Respondents Exxon Mobil Corporation and Exxon Shipping Company (collectively, "Exxon") made an agreement to pay Petitioner compound prejudgment interest regardless of whether state law or federal law governed the rate of interest. Alaska law provides, as applicable here, that prejudgment interest is simple (at the rate of 10.5%) unless the parties have agreed otherwise. AS 09.30.070(a); Pet. App. 7-8. Petitioner claims that such an agreement was made. Exxon agrees that in prior judicial proceedings it acknowledged that interest could be compounded if *federal* law governed the rate of interest, *see* 28 U.S.C. § 1961(b), but denies that any agreement was made to pay compound interest if *state* law governed. The district court examined the record of the parties' negotiations, and, in a careful opinion, found as a fact that no agreement was made to pay compound interest in all circumstances. Pet. App. 8-14, 17-20.

The Ninth Circuit affirmed, on the ground that the district court's decision was "not clearly erroneous." Judge Graber dissented. Pet. App. 2, 3. Petitioner does not seek review of that purely state-law determination.

Instead, Petitioner argues that three "equivocal" statements, Pet. App. 17, give rise to a judicial estoppel, as a result of which Exxon should be held bound by an "agreement" that the district court has found Exxon never made. Pet. 6-7. The district court rejected Petitioner's judicial estoppel theory on the ground that: (1) Exxon had not taken inconsistent positions; (2) the court had never been misled about Exxon's position; and (3) there was no unfairness to Petitioner — the three factors that go to whether a judicial estoppel should be found under *New Hampshire v. Maine*. Pet. App. 14-16. The Ninth Circuit affirmed in a decision that was unanimous on the judicial estoppel point. Pet. App. 2-3. This Petition followed.

A. Factual Background

On March 24, 1989, the tanker EXXON VALDEZ ran aground in Prince William Sound, Alaska. Pet. App. 23. Exxon and Petitioner, a seafood processor, promptly resolved Petitioner's claims for loss of income in 1989, but could not agree as to whether Petitioner was entitled to damages in subsequent years. After years of litigation, *see In re the Exxon Valdez*, 270 F.3d 1215, 1250-53 (9th Cir. 2001), the parties were able to agree on the amount of damages Petitioner had suffered, but still could not agree on how prejudgment interest on those damages should be calculated.

The parties' negotiations occurred against the background of a prior ruling by the district court (Order No. 299) to the effect that prejudgment interest would be governed by federal law, specifically 28 U.S.C. § 1961. *See* Pet. App. 30-31. Under that statute, the rate of interest is the "weekly average 1-year constant maturity Treasury yield," 28 U.S.C. § 1961(a), unless the district court determines otherwise based on the circumstances of the case. *See W. Pac. Fisheries, Inc. v. S.S. President Grant*, 730 F.2d 1280, 1289 (9th Cir. 1984). The statute expressly provides that interest "shall be compounded annually." 28 U.S.C. § 1961(b).

On September 27, 2004, the parties filed a stipulation with the district court advising that they had reached a negotiated settlement resolving all of Petitioner's outstanding claims for compensatory damages. Pet. App. 73-74. The stipulation also outlined the parties' disagreement over prejudgment interest: Exxon maintained that Order No. 299 mandated the use of the federal rate under 28 U.S.C. § 1961, while Petitioner insisted that it was entitled to a higher interest rate. *Id.* The parties stipulated that Petitioner "may move for determination of the appropriate rate of prejudgment interest on this settlement." *Id.* The stipulation did not address whether interest would be simple or compound. *Id.*

The parties memorialized their settlement agreement in a December 1, 2004 letter. Pet. App. 8. The letter recited that although the parties had agreed interest would be paid on the compensatory damages amount, "they have not agreed as to the appropriate interest rate or amount." *Id.* The settlement agreement, like the parties' stipulation and

the correspondence leading up to their settlement, was silent as to whether prejudgment interest would be simple or compound. Pet. App. 9.

Pursuant to the parties' agreement, Petitioner filed papers on the prejudgment interest issue, contending that a rate ranging from 29.32% to 9.20%, compounded annually, should apply to the settlement. Pet. App. 11, 27. Petitioner justified its request for compound interest not on the basis of any supposed agreement between the parties, but on the theory that 28 U.S.C. § 1961 gave the district court discretion to order compound interest, regardless of whether it determined that federal law or state law governed. Pet. App. 11.

In its responding papers, Exxon argued that Order No. 299 dictated the proper rate of prejudgment interest. Pet. App. 31. Exxon also agreed that it was within the court's discretion to decide whether interest should be compounded under 28 U.S.C. § 1961, and pointed out that in calculating the $742,799 in interest *already paid* to Petitioner (pursuant to Order No. 299), "Exxon voluntarily agreed to compound interest and factored that in to the computation of what it agreed to tender to Sea Hawk." Pet. App. 71 n.16. Exxon wrote:

> ***Consistent with Order 299 and the uniform settlement practice in this case***, the Court should fix the rate at 2.47%, the rate in effect when Exxon and Sea Hawk made their deal, but certainly no more than the federal funds rate in effect at the time of its loss, 4.11% for 1992 and 5.34% for 1993, ***with in-***

> ***terest compounded annually which Exxon voluntarily has done.***

Pet. App. 70-71 (emphasis added).[1]

On April 12, 2005, the district court ruled that 28 U.S.C. § 1961 governed prejudgment interest, concluding that federal law controlled the interest issue "despite the fact that Sea Hawk's claims are based on state law." Pet. App. 44. Noting that "Exxon states that it has voluntarily agreed to compound the interest annually," Pet. App. 30, the district court also held that "[t]he parties have agreed that prejudgment interest will be compounded annually; so, the motion is granted as to that issue," Pet. App. 46. In a subsequent order, the district court explained that, at the time of its April 12, 2005 ruling,

> the court did not believe that Exxon and Sea Hawk had an agreement as to compound interest if state law applied. Rather, it believed that Exxon had agreed to pay compound interest on the amount of prejudgment interest that it had already tendered to Sea Hawk, interest which had been calculated under federal law, which provides for compound interest. The court's reference to an "agreement" between the parties as to compound interest was a result of there being no *dis*agreement about compounding when the federal rate is employed, not the result of there being an *agree-*

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[1] The Petition repeatedly cites this and similar language as if it represented an agreement by Exxon to pay compound interest, as distinct from a factual description of how Exxon had calculated interest already paid. As the district court pointed out, the two are quite different. Pet. App. 11-12.

> *ment* that prejudgment interest would be compounded even if state law applied. The court did not believe that [] Sea Hawk and Exxon had reached an overarching agreement as to compound interest.

Pet. App. 14 (emphasis in original).[2]

On appeal, Petitioner argued that the district court erred by using federal law instead of Alaska state law to set the rate of prejudgment interest. *See* Pet. App. 54. In response, Exxon pointed out that Petitioner was asking the court of appeals to apply Alaska law inconsistently because it was both seeking compound interest and asking the court to apply AS 09.30.070(a), which provides for simple interest only. *See id.* To amplify this point, Exxon wrote that Petitioner "never asked the district court to apply the 'whole' of state law: it asked it to incorporate an Alaska statute providing for simple interest only into a settlement where interest is to be compounded." Pet. App. 54 n.9.

At oral argument, Exxon's counsel reiterated the point about the inconsistency between Petitioner's seeking compound interest and the terms of the

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[2] The Petition several times quotes a single sentence from a letter between counsel dated April 20, 2005, Pet. App. 50-51, which was intended to implement the order of April 12, 2005. Pet. 3, 7, 17. Of course this letter can have no application whatever to the question of *judicial* estoppel, since it involves no statement made to a court, and was dated after the district court's ruling of April 12, 2005. In any event, as the district court pointed out, the sentence on which Sea Hawk relies is ripped out of its original context; in its proper context it does not have the meaning that Sea Hawk tries to give it. Pet. App. 19.

Alaska statute. He noted that "the application of the Alaska statute to this case, by its own terms, is not possible, because the stipulation provides for interest to be compounded, the Alaska statute provides for simple interest." Pet. App. 58. If there was any ambiguity in this statement, the ambiguity was promptly cleared up in response to a question from Judge Graber, as the district court noted, with an unequivocal statement of Exxon's position that it never agreed to compound interest in all circumstances. Pet. App. 16-17, 58-59.

The Ninth Circuit reversed the district court's ruling that federal law applied, holding that state law should control the interest payable on a judgment based on state law. *Sea Hawk Seafoods, Inc. v. Exxon Corp.*, 484 F.3d 1098, 1102-03 (9th Cir. 2007). The court of appeals did not decide whether interest should be simple or compound, and remanded for the district court to resolve that question. *Id.*

B. The Rulings On Judicial Estoppel Below

On remand, the district court vacated its prior order "as regards the rate of interest and calculation of interest," and ordered counsel to confer on an amended final judgment that calculated prejudgment interest pursuant to the Ninth Circuit's ruling. Pet. App. 6. Petitioner responded by filing a motion seeking an order that Exxon should pay compound prejudgment interest. *Id.* Petitioner argued that: (1) Exxon had agreed to pay compound interest no matter which law, federal or state, the district court found to apply; and (2) Exxon was judicially estopped by its previous statements to the district court and

the Ninth Circuit from denying that it had agreed to pay compound interest. Pet. App. 14-16, 18.

In a careful opinion, the district court examined the settlement agreement, the relevant correspondence leading up to and following the settlement, and the parties' prior statements made during the litigation. Pet. App. 8-20. Based on its review of this evidence, the district court concluded that "the parties never agreed that Exxon would pay compound interest regardless of whether state or federal law governed." Pet. App. 20.

Next, applying the factors set forth in *New Hampshire*, 532 U.S. at 750-51, the district court declined to find a judicial estoppel. Pet. App. 14-17. The district court held that Exxon's current position was not "clearly inconsistent" with its earlier position. Pet. App. 15. The reason, wrote the court, was that during the initial prejudgment interest phase of the litigation,

> [it] did not believe that Exxon had taken the position that it had an agreement with Sea Hawk that it would pay compound interest regardless of whether state or federal law applied. Rather, it was the court's perception that Exxon's position was that prejudgment interest would be compound if federal law applied. The position that Exxon now takes, that it never agreed to pay compound interest if state law applied, is not inconsistent with its earlier position.

Id.

The district court continued that even if Exxon had taken inconsistent positions, its acceptance of

Exxon's current position "would not create a perception that this court was previously misled." *Id.* In its reference to Exxon's "agreement" in its initial ruling on the prejudgment interest issue, the court wrote, "it did not believe that Exxon had agreed to pay compound interest even if state law applied." *Id.*

Finally, the district court held that Exxon had not gained an unfair advantage because both parties "have been given the opportunity to brief and argue the question of whether the parties had an agreement as to compound interest." Pet. App. 15-16.

Addressing Exxon's argument to the Ninth Circuit that Petitioner was asking for the incorporation of "an Alaska statute providing for simple interest only into a settlement where interest is to be compounded," the district court refused to find this to be an admission by Exxon that it had agreed to pay compound interest. Rather, the district court concluded that this statement was made in the context of Exxon's legal argument that compound interest and AS 09.30.070 are inconsistent. Pet. App. 16. Further, this legal argument was "entirely consistent with Exxon's argument that compound interest is not allowed under Alaska state law." *Id.*

Similarly, the district court ruled that the "equivocal" statements by Exxon's counsel at oral argument before the Ninth Circuit "provide no support for Sea Hawk's contention that Exxon represented to the court of appeals that it had agreed to pay compound interest if state law applied." Pet. App. 16-17.

The Ninth Circuit affirmed. The court of appeals first held that the district court's conclusion that the

parties did not agree to compounding, reached "[a]fter taking evidence and hearing arguments," was not clearly erroneous. Pet. App. 2. The court of appeals noted:

> Although a letter from Exxon to Sea Hawk stated in part that the parties "agreed that prejudgment interest will be compounded annually," that statement appeared in the context of a ruling by the district court that the federal interest rate applied. The remainder of the letter suggests that the parties made their entire agreement in the light of that ruling and, therefore, in the expectation that federal law governed.

Id.

The court of appeals also ruled that the district court did not abuse its discretion in declining to apply judicial estoppel against Exxon. *Id.* The court of appeals noted: "Although the [district] court recognized that Exxon had previously taken the position that it had voluntarily agreed to compound interest, the court understood the agreement to be limited to federal law. That is, the court was not misled." Pet. App. 2-3. In dissent, Judge Graber wrote that the district court "clearly erred in finding that the agreement to pay compound interest depended on application of the federal rate of interest." She did not, however, dissent from affirmance of the district court's refusal to invoke judicial estoppel. Pet. App. 3.

Petitioner's petition for panel rehearing was denied. Pet. App. 47.

REASONS FOR DENYING THE PETITION

The Petition purports to seek review so that this Court may address whether the application of judicial estoppel requires showings that: (1) "a litigant's previous inconsistent position was adopted or accepted by the court in which it was advanced," and (2) "a court was misled by the litigant's prior position." Pet. i. These Questions Presented reveal a basic misunderstanding of the decisions below. Neither the district court nor the Ninth Circuit passed on either of those questions. Instead, they both stated correctly the flexible principles of judicial estoppel enunciated by this Court in *New Hampshire v. Maine*, and then applied those principles to find that judicial estoppel should not be applied here. Those factbound rulings raise no issue that warrants review; and they implicate no conflicts in the circuits.

A. The Decisions Below Did No More Than Apply The Principles of *New Hampshire v. Maine*

In *New Hampshire*, this Court, observing that the circumstances for applying judicial estoppel "'are probably not reducible to any general formulation of principle,'" 532 U.S. at 750 (internal citations omitted), nevertheless identified three factors that "typically inform" whether to invoke judicial estoppel:

> First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later pro-

> ceeding would create "the perception that either the first or the second court was misled." Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 750-51 (internal citations omitted).

The district court's opinion in this case faithfully adhered to these principles, first setting forth the *New Hampshire* factors and then applying them to the facts of this case based on a detailed review of the evidence. *See* Pet. App. 14-16. Exercising its considerable discretion, the district court declined to find judicial estoppel, because: (1) Exxon's position that it did not agree to pay compound prejudgment interest if state law applied was not inconsistent with its prior position that interest would be compounded if federal law was deemed to apply; (2) there could be no perception the court had been misled since the court had never adopted the view that Exxon "had agreed to pay compound interest even if state law applied"; and (3) there was no unfair advantage because the parties received the opportunity to brief and argue the issue of whether there was an agreement to compound interest. Pet. App. 15-16. The Ninth Circuit affirmed, holding that the district court's refusal to invoke judicial estoppel was not an abuse of discretion. Pet. App. 2-3.

Petitioner does not suggest, much less demonstrate, that either the district court or the Ninth Circuit misstated the law that applies to judicial estoppel. Indeed, Petitioner's statement of the law of judicial estoppel, Pet. 9-10, is virtually identical to the district court's statement of that same law, Pet. App. 14-15. Petitioner's quarrel with the courts below is plainly not a disagreement over the lower courts' statement of the law; it is rather with their application of that correctly-stated law to the particular facts of this case. Thus, Petitioner restates its factual arguments why judicial estoppel should be applied, Pet. 17-18, and contends that the Ninth Circuit's decision was "not a proper application of this Court's holding in *New Hampshire*," Pet. 18. Even assuming *arguendo* that those arguments had merit (which they do not), neither of them presents a suitable ground for granting review. It is well established that this Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (improvident grant of cross-petition that presented primarily "a question of fact, which does not merit Court review"). Similarly, the assertion that a lower court misapplied a properly stated rule of law rarely provides a basis for granting certiorari, and should not do so here. *See* Sup. Ct. R. 10; Eugene Gressman et al., *Supreme Court Practice* 276 (9th ed. 2007) (this Court does not "review and correct every misstep made by the lower courts in the application of accepted principles").

In short, nothing in the factbound rulings by the district court and the Ninth Circuit "so far departed from the accepted and usual course of judicial proceedings" so as to justify this Court's review. Sup. Ct. R. 10. To the contrary, as explained above, both decisions were perfectly consistent with the principles for applying judicial estoppel laid down in *New Hampshire*.

B. Petitioner Has Not Demonstrated Any Conflict In The Circuits

Petitioner also contends that the Court should review the Ninth Circuit's judgment because there are inter-circuit conflicts concerning whether judicial estoppel can be applied when the court did not "accept" a party's prior position, or in the absence of a finding that the court was misled. Pet. 10-16. Petitioner presents these points as if they were two independent subjects, but it is hard to see logically how this can be so. If the court to which a party's first position was presented did not accept it, there cannot be a "perception" that the court was misled. "Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations." *New Hampshire*, 532 U.S. at 750-51. Conversely, it is hard to see how a court that was not "misled" would accept a party's prior position that is inconsistent with the true facts.

What is in fact under discussion in the circuit court cases cited by Petitioner is the extent to which the second prong of *New Hampshire*'s "flexible" and "non-exhaustive" test for judicial estoppel is a mandatory prerequisite for a finding of judicial estoppel. All circuit courts uniformly follow *New Hampshire*'s

holding that courts deciding whether to apply judicial estoppel should *consider* whether a court accepted the party's prior position and was misled. Some courts emphasize this factor more than others, and may even decline to find a judicial estoppel absent a tribunal's adoption of a party's prior position.[3] Other courts weigh "judicial acceptance" along with the two other *New Hampshire* factors in considering whether to invoke judicial estoppel.[4] Both approaches, however, are consistent with the flexible application of judicial estoppel principles endorsed by this Court. *See New Hampshire*, 532 U.S. at 751 ("In enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel."). At most, the differences among the lower courts in applying the second prong of *New Hampshire* are attributable only to "different verbal formulations of the same underlying legal rule," which, as Justice Breyer has explained, are not "actual divides among

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[3] *See SBT Holdings, LLC v. Town of Westminster*, 547 F.3d 28, 37 (1st Cir. 2008); *Stichting Ter Behartging Van de Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 407 F.3d 34, 45 (2d Cir. 2005); *United States v. Pelullo*, 399 F.3d 197, 223 (3d Cir. 2005); *1000 Friends of Md. v. Browner*, 265 F.3d 216, 226-27 (4th Cir. 2001); *Peoples State Bank v. GE Capital Corp. (In re Ark-La-Tex Timber Co.)*, 482 F.3d 319, 333 (5th Cir. 2007); *Pennycuff v. Fentress County Bd. of Educ.*, 404 F.3d 447, 453 (6th Cir. 2005); *Duthie v. Matria Healthcare, Inc.*, 540 F.3d 533, 542 (7th Cir. 2008).

[4] *See Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1049 (8th Cir. 2006); *United Nat'l Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772, 780-81 (9th Cir. 2009); *Bradford v. Wiggins*, 516 F.3d 1189, 1195 (10th Cir. 2008); *Stephens v. Tolbert*, 471 F.3d 1173, 1177-78 (11th Cir. 2006).

the lower courts" but merely "minor linguistic discrepancies" that "are not outcome determinative." Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. App. Prac. & Process 91, 96 (2006).

Contrary to Petitioner's assertions, Pet. 10-13, the circuit courts have not reached conflicting results based on their different formulations of the weight to be given *New Hampshire*'s second prong.[5] Petitioner cites only to dicta. But dicta do not create a circuit conflict in the absence of conflicting *results*. *See* Gressman et al., *supra*, at 241 (To justify certiorari, "there must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized.").

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[5] Nor has this purported conflict been "widely recognized." *Id.* at 13. The "conflict" discussed in *Transamerica Leasing, Inc. v. Institute of London Underwriters*, 430 F.3d 1326 (11th Cir. 2005), concerned the narrow question of "whether judicial estoppel should apply when the prior position resulted in a settlement, and not in the court actually adopting a position." *Id.* at 1336 n.8. Notably, three of the five cases cited in *Transamerica* on this point precede the *New Hampshire* decision, and therefore could not have staked out conflicting positions on this Court's instructions regarding "judicial acceptance." *See id.* In addition, the authorities presenting the narrow conflict over whether settlements qualify for judicial estoppel are inapplicable to the facts of this case. Here, the parties did not settle the issue of prejudgment interest; they submitted it to the district court for resolution. *See* Pet. App. 73-74. Similarly, the First Circuit, in *Thore v. Howe*, 466 F.3d 173 (1st Cir. 2006), did not identify "a split on this issue between the First and Third Circuits." Pet. 13. It merely noted that while the First Circuit had recognized certain criteria for the application of judicial estoppel, the Third Circuit had articulated certain others, none of which were conflicting. *See Thore*, 466 F.3d at 182 n.2.

None of the cases Petitioner cites finds a judicial estoppel when the prior inconsistent statement was not accepted by the prior court, or where the prior court was not misled; similarly, none of Petitioner's cases refuses to find a judicial estoppel when the first and third prongs of *New Hampshire* are met but not the second.[6] The *results* of the decided cases are thus not in conflict, even if some language in some cases might suggest a conflict may arise in some future case.

Whatever the divergence in dicta in the circuit courts, moreover, none of the issues under discussion is presented by the facts of this case. Whether judicial acceptance of the party's prior position or the perception that a court was misled should be an absolute prerequisite for judicial estoppel or whether it should be merely one factor among others to be taken into account, the answer would make no difference here. Petitioner does not even suggest that it would. Rather, in this case, the district court looked at all the *New Hampshire* factors, and concluded that *none* of them was present here. It does

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[6] Petitioner's treatment of the cases is sloppy. Thus, Petitioner says that some courts have allowed litigants to assert inconsistent positions, "so long as no one is misled." Pet. 16 & n.7. But three of the four decisions Petitioner relies on each expressly found that the parties had *not* asserted inconsistent positions. *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 148 (2d Cir. 2005); *Ameritox, Ltd. v. Aegis Corp.*, No. 07-80498, 2008 WL 4540063, at *3 (S.D. Fla. Oct 10, 2008); *In re Oneida Ltd.*, 383 B.R. 29, 45-46 (Bankr. S.D.N.Y. 2008), *rev'd and remanded on other grounds*, 562 F.3d 154 (2d Cir. 2009). (The fourth decision in fact found a judicial estoppel, and thus did not allow the plaintiff to assert inconsistent positions. *See Thore*, 466 F.3d at 181-85, 187.)

not matter to that determination in any way whether the second prong is an absolute prerequisite to a judicial estoppel or just one factor among many. Whatever the legal significance of the second prong in some other case, the district court found that that prong was not met here. Therefore the district court's decision would not be changed in any way by this Court's resolution of the issues Petitioner asks the Court to review.[7] There is accordingly no reason to grant certiorari. *See* Gressman et al., *supra*, at 504 (case "presents a poor vehicle for resolving a conflict" where case "would be decided in favor of the respondent no matter how the conflict were resolved").

Similarly, no circuit conflict is implicated by the Ninth Circuit's observation that "the [district] court was not misled." Pet. 18. That was not a ruling that judicial estoppel could never apply unless a court was misled, as Petitioner wrongly suggests. *Id.* The court of appeals neither reached nor decided that question. Its language reflected at most a holding that a district court that (1) did not understand a litigant's statements to be inconsistent with one another; and (2) was not misled could, without abuse of discretion, refuse to find a judicial estoppel.

In *New Hampshire*, this Court ruled that in evaluating whether to find a judicial estoppel, the

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[7] That is, if the Court were to hold that the second prong were a necessary prerequisite for judicial estoppel, there would be no judicial estoppel here because the district court has already held that factor is not met. Conversely, if the Court were to hold that the second prong was only one consideration among many (as the district court supposed), the district court would make the same analysis as before, and the outcome would be the same.

lower courts should, inter alia, "inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled.'" 532 U.S. at 750. That is exactly what the district court and the Ninth Circuit did here. Applying those principles to the facts of this case, they found that application of judicial estoppel was unwarranted. They decided nothing broader than that, nothing that put them in conflict with any other circuit, and certainly nothing that would call for an exercise of this Court's certiorari jurisdiction.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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